IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6431

ABDIEL CABAN,

Appellant,

v.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

APPELLANT'S REPLY BRIEF

ROBERT H. SILK
Suite 1701
401 Broadway
New York, New York 10013
(212) 966-1545
Attorney for Appellant

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INTRODUCTION

The thrusts of appellees' brief are essentially four-fold: (1) Conceding appellant's own fitness to have adopted his children if they had not opposed it, they justify ousting him of all parental rights on the unfactual assumption that the paternal adoption is not by a "blood-stranger" and that the contest is like an intra-family custody dispute "between competing parents"; (2) based on the same false premise that the step-father is a blood relative of the children, a claim that the Court can ignore the constitutionally mandated first-stage proof of parental abandonment or unfitness, as well as the solid family relationship between appellant and his children, and go straight to the "best interest test"; (3) a

claim which is without any validity at all, that married and unmarried fathers in New York have equal rights under the statute and that appellant was not treated in any way different from a married father when his consent to the adoption was dispensed with; (4) a claim that the "fitness of the father" test is equivalent to the "best interest of the child" test in New York.

Of these major propositions, the first and second rest on the same falacious premise and lack legal merit, while the third and fourth were recently demolished by the New York Court of Appeals in *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383 (7/13/78)

The Attorney General's brief, after betraying a massive lack of knowledge of the record, has a double thrust: Reliance on *Matter of Malpica-Orsini,* 36 N.Y.2d 568 (1975), app.dis. *sub nom. Orisini v. Blasi,* 423 U.S. 1042 (1976); and without showing the similarity, an unreasoned equation of the facts at bar with those of *Quilloin v. Walcott,* ____ U.S. ____ , 54 L.Ed.2d 511 (1978), in order to gain the same result.

Both briefs go so far as to misstate the facts and involve statutes not even in effect when the adoptions were granted. In the end, when the dust has settled, only appellant's male gender and his lack of formal marriage ties to the female parent are left standing as the basis for the loss of his children. Appellant will endeavor here to clarify both facts and applicable law and to reply to appellees' and their friend's main contentions.

I.

THE ISSUES HERE CANNOT BE RESOLVED ON THE BASIS OF THE PERCENTAGE OF CONTESTED ADOPTIONS IN NEW YORK.

Appellees opened their argument with the observation that few unwed fathers oppose adoptions in New York (Appellees' Brief, 4 (hereafter referred to as "AEB")). This is different from saying that few unwed fathers care for their children. If it is true that there are few contests, the reasons may vary. Factors such as the natural reluctance on the part of most men to try wresting children away from their natural fathers to be substituted in their place may play its role. So too may the fact that some unwed fathers may be unidentified. The penalty of fatherhood unaccompanied by marriage to the mother which is exacted by §111 and deprives the unwed father of anything more than supportive standby status until an adoptive father comes along, surely discourages the development of a parent/child relationship which many fathers would then fight to protect. In any event, the fact of such a statute on the books deters legal contest, absent a willingness and determination to carry it all the way to this Court. There are in addition, of course, a host of agency sponsored non-adversary adoptions of truly abandoned and homeless children, unlike those here.

Certainly, the putative paucity of such contests does not justify taking appellant's children away from him. If it is the rule that most adoptions are consented to, the ones here are not.

II.

NOT AN APPLICATION OF THE "BEST INTEREST OF THE CHILD" TEST, BUT A PUNITIVE DISCRIMINATORY DENIAL OF PARENTAL RIGHTS TO APPELLANT BECAUSE OF HIS SEX AND UNWED STATUS IS THE BASIS BELOW OF THE ADOPTION OF HIS CHILDREN WITHOUT HIS CONSENT.

A. The Rights of Appellant were not Posited on his Children's Best Interest but Upon his Unwed Male Status.

Appellees appear to recognize that the statutory distinction between wed and unwed fathers' rights to protect their children from being taken away by adoption is not rationally justifiable. Therefore, they heavily rely in their brief upon the claim that "UNDER THE NEW YORK STANDARD OF THE BEST INTERESTS OF THE CHILD, THE RIGHTS OF MARRIED AND UNMARRIED FATHERS TO PREVENT ADOPTION ARE PRECISELY EQUAL." (AEB, 12) The Attorney General contends: "The State of New York has implemented an adoption process which operates smoothly and efficiently and has, as its primary beneficiary, the interest of the children at heart." (Attorney General's Brief, 21-22 (hereafter referred to as "AGB")).

Neither the appellees nor the Attorney General have correctly stated the New York law. In fact, it is quite the opposite. The rights of married and unmarried fathers are not equal and the New York law does not evenly apply the standard of the "best interest of the child" or have that interest as its "primary beneficiary." Both contentions are

disposed of by the New York high court in *Matter of Corey L.* The significance of that most recent interpretation of the New York adoption law's consent requirements, as they appear in §111, is that it illuminates the parameters of parental rights to withhold consent and veto adoptions and so highlights the extent to which they have been denied to appellant. Appellant will address the contentions made by appellees and the Attorney General in the light of that case.

Appellees have properly noted that adoption without parental consent is a two-stage process. The first step is to overcome lack of parental consent by showing facts which dispense with it. This is the predicate to the second step, which is to determine the best interest of the child. The sharp difference in the way mothers and married fathers are treated on the one hand and unwed fathers like appellant on the other in New York is manifest from the fact that the first stage is bypassed in the case of unmarried fathers — though appellees confess the first stage to be a "jurisdictional predicate".

> "In the practical operation of the statute the omissions of the 'consent' and the allegations of the 'dispensing conditions' in the petition are merely omissions of jurisdictional predicates. The hearing instead of being a two step proceeding as in the case of a married father becomes a one step proceeding. The court proceeds immediately to the determination of the substantive issue of 'the best interests of the child.' " (AEB,11)[1]

[1]In fact, appellees *did* allege a "dispensing condition", namely "abandonment" in both adoption petitions and in their citations. (A.4,6,7,9) They did not prove it, nor do they argue that they did in their brief. The citations required appellant to show cause why "a further order determining that Abdiel Caban has abandoned said minor child and dispensing with his consent to the adoption of said minor child by the petitioners" should not be made. But after they failed to prove his

(continued)

Appellees' contention made immediately afterward that "Under New York law, the unmarried and married father have precisely equal rights to prevent the adoption, or as appellants say it, to 'veto' the adoption, in the court's determination of the substantive issue of 'the best interests of the child.'" (AEB, 11-12) does more than brazenly contradict the admission just made concerning "the practical operation of the statute". It is also in a flat 180 degree collision course with the New York law as authoritatively expounded by its high court as recently as July 13, 1978 in *Corey L.*

Corey L. is an exemplar of Section 111 in action. There, a married father, with far fewer paternal connections with his child than appellant has in this case, refused to consent to his child's adoption by a stepfather. An effort was made to dispense with his consent by claiming "abandonment" of the child he had hardly seen and had totally not supported for several years, though he lived in the same neighborhood. The court held the stepfather to strict proof of the existence of the "statutory and constitutional" dispensing-with-consent conditions. It found that the proof did not meet the standards necessary to oust that married father of his important parental rights, and it dismissed the adoption petition in an Opinion per Cooke, J. (who also authored *Malpica-Orsini*).

A clearer example of the wide gap existing in New York between married and unmarried fathers cannot be found than in comparison of *Corey L.* for married ones with *Malpica-Orsini* and the opinions below for those not wed.

(footnote continued from preceding page)
abandonment, appellees have understandably reversed track and downplayed their original agreement that there could be no adoption without appellant's consent, unless a "dispensing condition" was alleged and demonstrated.

The solicitous treatment of a married father's parental rights under §111, per *Corey L.* in contrast to the disdain shown for appellant's points up the irrationality of the statutory classification. It cannot soundly be argued that the state has such a powerful interest in preserving the vaguely visible link between a married father and his child, and such a smaller interest in safeguarding the ties which a devoted and caring unwed father has to his, that it can protect the weak family relationship but blot out the strong one because of lack of a marriage certificate.

Section 111 provided there and here that "abandonment" was a basis for overcoming the legal barrier existing when a married father opposes adoption of his child. It had been claimed to exist in *Corey L.* to overcome a married father's objection. It was claimed to exist to overcome the unwed father's opposition here.

In *Corey L.*, two years of very infrequent contact and total non-support for longer than that was proved. This did not spell out "abandonment". For want of that dispensing-with-consent condition, the adoption failed. By contrast, the unmarried father here had steady contact at all times, as well as custody and full support just before the adoption petitions were filed. But this adoption did not fail. The reason: appellant was an unwed male parent. The children were thus adopted despite his desire to keep them and without any of the "dispensing" conditions having been proved.

When the decision below is read together with *Corey L.*, it becomes clear that New York applies *Stanley* based principles[1a] to protect fathers' substantive parental rights

[1a]The Court of Appeals in *Corey L.* credits its own *Matter of Bennett v. Jeffreys* for the basic principles. But in *Bennett*, it had deferred to *Stanley* as the doctrinal source. 40 N.Y.2d, 546. See *Matter of Sean "Y" v. John "Y"*, 62 A.D.2d 426, 427 (1978) for avowed use of *Stanley* as font of constitutional right of divorced father opposing adoption.

only when the fathers are married, but denies the benefits of *Stanley* to fathers if they are unmarried. *Corey L.* teaches that New York will be guided by the Fourteenth Amendment, as expounded by this Court, when it is in harmony with §111. But where it is not, as here, New York will follow the statute.

As for "best interest", the Court of Appeals in *Corey L.* emphasized that, at the threshold stage in an adoption case, where a married father is concerned, the "best interest of the child * * * is not involved". The court referred both to the constitutional and §111 rights of married fathers. Hence, where the adoption of children born in wedlock is concerned, it is not correct for appellees and the Attorney General to infer that "the best interests of the child" motivates New York policy at the jurisdictional threshold level. Before "best interests" becomes the issue, *Corey L.* holds the non-consenting parent must first be divested of his parental rights by strong proof of abandonment or unfitness. If not proved, that is the end of the case. At least if the non-consenting parent is a wed father or any kind of mother under §111. The statute and the 14th Amendment are in harmony for them. But not for the unwed father.

Since the unwed father has no substantive parental rights under §111, there is no statutory need to divest him of anything. This is not because of the "best interests" of his children. Appellees concede appellant to be fit enough to adopt them himself. (AEB, 15; see "IV(A)" *infra*) The sole reason for consigning him to the nether-world of parents without right to keep their children is that the statute sweepingly denies that right to unwed male parents without regard to fitness, and appellant is a member of that proscribed class.

B. *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383 (1978) and the Protection of the Rights of the Married Divorced Father in New York.

Corey L. is quoted here at length because it is now the definitive and authoritative exposition of New York adoption law as it relates to the rights of all parents — except unwed male parents. When placed alongside the holding at bar, it evidences the sharp disparity of treatment in New York between married and unmarried fathers. It illustrates the bizarre fact that the New York Court of Appeals feels itself bound to apply *Stanley* principles to married fathers, but refuses to do so where unmarried fathers' rights are jeopardized, as here. For this is what the Court of Appeals ruled concerning a married father in *Corey L.* who faced a step-father's and natural mother's adoption petition, just as does appellant at bar (after first acknowledging that "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption." (45 N.Y.2d, 386)) (*Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383, 391 (7/13/78)):

> "Petitioners urge that 'when the factual situation is within the gray area the Court should find an abandonment and conclude that the best interest[s] of the child be considered paramount to the parental interest.' But at this juncture, '[w]e do not dwell upon such considerations, for they are foreign to the issue. * * * The petitioners ask for more than custody. They seek to make the child their own' (*Matter of Bistany*, 239 N.Y. 19, 24 [Cardozo, J.], *supra*). Under section 111 of the Domestic Relations Law as applied to the instant facts, the consent of the natural father or an abandonment was a prerequisite to the judicial

termination of his parental relationship. Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion (cf *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment (see *Matter of Paden,* 181 Misc. 1025, 1027; 2 N.Y. Jur., Adoption, §2, p. 5).

The severance of the parental tie could not be predicated upon the report of the Department of Social Services that the adoption would be in the best interests of the child. Where the issue was the right of a natural parent to custody of his child, this court has not hestitated to hold that a parent cannot be displaced because 'someone else could do a 'better job' of raising the child'; rather, only when 'extraordinary circumstances' such as abandonment, unfitness, or persistent neglect are found, 'the court must then make the disposition that is in the best interest of the child' (*Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child.

The filial bond is one of the strongest, yet most delicate, and most inviolable of all relationships, and in dealing with it we must realize that a child is not a mere creature of the State for distribution by it (cf *Pierce v. Society of Sisters,* 268 U.S. 510, 535). This is not a new problem. It is fraught with emotion, impossible to compromise and one in which the stakes are high. There has always been abiding respect for the rights of natural parents (see *People ex rel. Kropp v. Shepsky,* 305 U.S. 465, 468-469; *Matter of Livingston,* 151 App. Div. 1, 7). On the other hand, there is a coordinate need to protect children. Certainly, the amendments to section 111 of the Domestic Relations Law (Laws of 1975, ch. 704, §3; see, also, Laws of 1976, ch. 666) may be viewed as an expression of a desire to move the courts away from a perceived tendency to favor the residual rights of abandoning parents to the detriment of the child. Nevertheless, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed, so much so that it raises questions of constitutional dimension (see *Matter of Goldman,* 41 N.Y.2d 894, 895, *supra*; *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). In any event, on this record, the burden necessary to determine those rights has not been met.

Accordingly, the order of the Appellate Division should be reversed, without costs, the petition for adoption dismissed, and the matter remitted to the Family Court, Chenango County, for further proceedings on appellant's application for custody or visitation."

Especially to be noted in *Corey L.* is the Court of Appeals statement:

"There has always been abiding respect for the rights of natural parents."

If those rights had been respected at bar as they were in *Corey L.*, appellant would not now be here. He was denied their benefits and penalized by losing his children only because of his sex and lack of marital status. Had the courts given weight to the rights of this unwed father equivalent to the divorced one in *Corey L.*, the disposition in both cases would have been the same: the adoption petitions would have been dismissed "and the matter remitted to the Family Court * * * for further proceedings on * * * custody or visitation." Those proceedings, unlike the parental rights termination involved in the adoption proceeding, would there be governed by the best interests of the children.

The refusal of the courts below to accord appellant the benefit of the principles which it applies to married fathers denies appellant substantive Due Process and the Equal Protection of the Laws.

C. Upon the Basis of a Conclusive Presumption that all Unwed Fathers are Unfit, Appellant has been Punished by Being Deprived of his Children.

Appellees contend that there is no conclusive presumption in New York that unwed fathers are unfit. To the contrary: The bypassed first step in the adoption process contains the constitutionally required elements regarding unfitness. By skipping over that stage to the "best interest of the child", but only where the non-consenting parent is an unwed father, the statute conclusively deems the first stage unfitness requirement regarding unwed fathers automatically to have been met. As applied in this case, the total absence of proof of unfitness on the part of appellant was ignored by the New York courts.

Only the trial court below reviewed the merits to any extent. Running as a thread through the opinion of Surrogate Sobel is the barely suppressed assumption that the interest of appellant in caring for his children is *de minimus* because he was an unwed father. The contrast with this Court's ruling in *Stanley v. Illinois*, 405 U.S. 645, 657 (1972) that the State's interest in caring for a child is *de minimus* if its unwed father is fit is apparent. But preferring to derive doctrinal inspiration from *Malpica-Orsini* than from *Stanley*, the courts below treated the jurisdictional unfitness threshold as if it had been proved, despite all the evidence to the contrary. This runs directly afoul of *Stanley* (405 U.S., 656):

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."
>
> (ibid, at p. 658)
>
> "It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing [on his fitness] when the issue at stake is the dismemberment of his family."

Upon the basis of this presumption, appellant loses his children to another. The effect is punitive: Only because he fathered two children out of wedlock, he is condemned to having them taken away from him. It is as cruel a penalty as can be imposed on any father. Even a murderer begins with

a presumption of innocence. But not an unwed father in New York.[2]

III.

QUILLOIN V. WALCOTT AND "THE FACTS ARE DETERMINATIVE; THE SOLID FAMILY RELATIONSHIP HURDLE.

Appellees and the Attorney General recognize that they must overcome the hurdle presented by the solid family relationship between father and children which spring into being at conception and birth and continued throughout their lives until it was broken up by the adoption orders. That relationship represents a firmly protected interest of parent and his children alike, and exists in this case. Not a single fact concerning it in Appellant's Brief has been challenged.

> "The private interest here, that of a man in the children he has sired and raised * * * undeniably warrants deference and, absent a powerful countervailing interest, protection. * * * Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)

It is the "family" interest of a parent, including an unwed father, which is protected by the Fourteenth Amendment. Where the issue at stake "is the dismemberment of his family", the father is constitutionally entitled to a "hearing on [his] fitness before [his] children are removed from [his] custody." (ibid, 658) Indeed, "the State's interest in caring for [his] children is *de minimus* if [he] is shown to be a fit father." (ibid, 657)

The grant of review in this case followed almost immediately upon the heels of *Quilloin v. Walcott,* ____ U.S. ____ 54 L.Ed.2d 511 (1/10/78). That case called up for consideration the validity of Georgia legislation substantially identical to the New York statute reviewed here. The Georgia high court had upheld its constitutionality on the exclusive authority of *Malpica-Orsini.* (238 Ga. 230, 233) This Court affirmed for different reasons. It did so because, under the facts in *Quilloin,* the father had failed to establish a family relationship with his child such as *Stanley* held to be entitled to constitutional protection.

Quilloin refused to extend substantive *Stanley* rights to a father who had only "sired" but not "raised" or had a "family" relationship to his child. It limited *Stanley* protections to those unwed fathers who factually demonstrated that they played a true parental role in the care of their children, but denied it to others. Whether an unwed father had a relationship sufficient to invoke constitutional protection in an adoption case under *Stanley* would

[2] *In re Rodriguez,* 34 Cal. App. 3d 510, 511 Cal. Rptr. 56 (1973) A petition had been filed in the California court to have four children of a father serving a life sentence for murder of the mother freed from the custody and control of their father and placed under the Welfare Department for adoption placement. The father was not provided with court appointed counsel to represent his interest. The California court noted that "we cannot quarrel with the demonstrated interest of the appellant in resisting efforts to have his children freed from his control." (34 Cal. App. 3d, 513) It held that the father faced consequences to himself even more drastic than result from criminal prosecution. It described the petition leading to adoption of this man's child as

> "in every sense an accusatory proceeding in which the loss of parental relationship to his child may be a vastly greater punishment than the levying of a fine or even imprisonment resulting from a criminal conviction." (34 Cal. App. 3d, 515)

depend on the facts of each case. Not once did the *Quilloin* Court refer to *Malpica-Orsini.* The fears expressed there by the New York Court of Appeals should parental rights be extended to unwed fathers in adoption cases were put to rest.

Appellees and the Attorney General agree that "*Quilloin* as a definitive interpretation of *Stanley*" "plainly establishes" that "the facts are determinative". (AEB,17; AGB,15) Those are detailed in Appellant's Brief, and are nowhere denied. They are appellees' chief problem.

IV.

APPELLEES ADMIT APPELLANT'S FITNESS BUT OTHERWISE APPELLEES' AND THE ATTORNEY GENERAL'S BRIEFS CONTAIN MAJOR ERRORS OF FACT AND RECITE STATUTES NOT IN EXISTENCE WHEN THE ADOPTIONS WERE GRANTED.

A. Appellees Concede Appellant's Fitness to Adopt the Children Himself, and do not Deny his Family Relationship with Them.

Appellees' brief is marked by a concession that, if appellant had been contesting the adoption with anyone other than the stepfather, he would have prevailed.

> "* * * this was not an adoption by blood-strangers to the children." (AEB,2) "Despite the existence of some of the 'extra-ordinary circumstances' in this case, * * * if the contest had been between appellant Abdiel Caban and blood-strangers to his children, there is little doubt that his cross-petition to himself adopt would have been granted." (AEB,15)

Appellant's own fitness is thus admitted. Nowhere is there a denial of his lengthy involvement in living with and helping to raise his children. Appellees rely strongly on the fictitious premise that Kazim Mohammed - by marriage to Maria, apparently - is a "blood" relative of the children, to keep their case afloat. His relationship was the same as appellant's wife. But appellees do not say that Nina Caban was other than a "blood-stranger".

* * * * * * * *

B. Appellees' and Attorney General's Digressions and Misleading Versions of the Facts

Conceding appellant's fitness as a father and unable to contest his familial ties with his children, appellees face the dilemma that those "facts are determinative". They can only approach the evidence after it is seasoned with partisan spice.

Appellee's zeal has led them far afield into Maria's unsubstantiated complaint that Abdiel did not treat her properly, which she says justified her leaving him - as though they were married and she needed justification. (Such was the relationship into which the children were born that, to this day, appellees continue to treat it as though it was a marriage which could not be broken up without cause.) Maria's charges against Abdiel did not include a single claim of misconduct by him as a parent.

It has led them astray into gross errors of fact. And to confuse matters still further, they cite statutes for serious consideration which played no role in the adoption orders because they did not come into effect until afterwards.

Appellees' and Attorney General's Version:

"At no time did appellant formally acknowledge that he was the father of the children (74-75)" (AGB, 7) "Maria listed him as the child's father without his assent (R.74, R.122)." (AEB,22).

The Record:

The argument should fall by the wayside. It is factually incorrect and legally insignificant. The listing of Abdiel as father of David may have been without his knowledge at the time, but it was certainly not "without his assent". There is no testimony that he objected to this. Indeed, he always acknowledged his fatherhood of both children. (R.221, 336-7) Appellant "formally acknowledged" his paternity of Denise before the Board of Health (R.85-6). He formally acknowledged paternity of both in his cross-petitions to adopt them. (A.11, 16)

But it is characteristic of upholders of the constitutionality of the treatment to which appellant was subjected to avoid the realities of his relationship to his children and to harp instead on formalities. If there is any constitutional significance of a "formal acknowledgement of paternity", where there is informal acknowledgement by word and deed, and fatherhood is not disputed, it has not been explained. Nothing in *Stanley v. Illinois* makes this a predicate for protection of the parent/child relationship under the Fourteenth Amendment. "Formal acknowledgment" of paternity made no difference in any event, as witness the result below.

* * * * * * * * * * *

Appellees' and Attorney General's Version:

Appellant "had no arrangement" to support Gloria, his wife at the time, and the children of his eight year dormant

marriage to Gloria, and there was no evidence he did so. (AEB,21; AGB,7)

The Record:

The evidence was noted by the trial court that he supported the children, "arrangement" or no (A.29; R.390).

* * * * * * * * * * *

Attorney General's Version:

"Appellant did not attempt to divorce his wife Gloria while he was living with Maria, nor did he ask or offer to marry Maria" (AGB,7).

The Record:

"I had been trying to get a divorce from her for the longest time. I had not been successful." (R.354) When appellant finally obtained it in June, 1974, he proposed marriage to Maria because he wanted the children back. She turned him down without informing him that she had already married Kazim. (R.353-6) Indeed, Maria made no claim she had ever wanted to marry appellant in the first place.

* * * * * * * * * * *

Appellees' and Attorney General's Version:

Maria paid "all the household expenses", etc. (AEB,22; AGB,7)

The Record:

That was Maria's claim. Appellant testified otherwise. (R.337-340) The trial court accepted his testimony and not hers. (A.28)

* * * * * * * * * * *

Appellees' and Attorney General's Version:

The grandmother told appellant the children were being

removed to Puerto Rico and he did not object. (AEB,24; AGB,8)

The Record:

This is what Maria's mother claims. Appellant denied it. (R.352, 357-8, 371) One thing is certain: Appellees sent the children away to Puerto Rico and appellant brought them back.

* * * * * * * * * * * *

Appellees' and Attorney General's Version:

Appellant did not communicate with the maternal grandmother or the children while they were in Puerto Rico. (AEB,24-25; AGB,8)

The Record:

Appellant's father in Puerto Rico was in frequent contact with the children there and appellant was in constant touch with him concerning their welfare. (R.242-244, 358-9)

* * * * * * * * * * * *

Attorney General's Version:

"It should be noted that the trial court could not find even a scintilla of evidence supporting appellant's contention that Maria had abandoned the children. (Appendix, p.30)" (AGB,8)

The Record:

Whether Maria had abandoned the children was relevant only to their stepmother Nina's cross-petition to adopt. The Attorney General omits to note that there was not "even a scintilla of evidence supporting [appellees'] contention that [appellant] had abandoned the children," as alleged in their petitions to adopt and in their citations (A.4,6,7,9). Nowhere in any of the opinions below was there a finding of abandonment on the part of appellant.

* * * * * * * * * * * *

Attorney General's Version:

The Family Court returned custody of the children to Maria on November 25, 1975 (378)" (AGB,8)

The Record:

Not so. The page reference does not support the date. The date of the Family Court order temporarily transferring custody from the father to the mother with visitation rights reserved to the former pending a hearing on the merits was January 15, 1976. No hearing was ever held. (A.29; R.270-1, 374-9) On the date mentioned in the Attorney General's Brief, appellant was exercising exclusive custody of his children. He continued to do so for two months until January 15, 1976, the date of the Family Court order. On or about that same day, appellees filed their adoption petitions (A.3,5) alleging that appellant had abandoned the children (A.4,6). Appellant had enjoyed full custody of the children for the last two months of the sixteen months preceding the filing of the adoption petitions, and appellees not at all.

* * * * * * * * * * * *

Attorney General's Interjection of the Issue of the Wealth of the Respective Parties and Appellant's Need to Obtain Leave to Proceed In Forma Pauperis into the Case:

Appellees' friend goes beyond the record on which the adoptions were granted to reach filed material relating only to the relatives affluence of the parties, as though it bore on the constitutional issues. He draws the Court's attention to appellant's motions to proceed as a poor person in the Court of Appeals and here.

Appellant does not shrink from this. The facts are clear: Appellant bought a house to accommodate his children;

before they could all move in, the children were permanently taken from him by the adoption orders; appellant has stripped himself bare in his legal fight to regain them; and he has lost his new house by foreclosure while waging that fight.

While appellant is pleased to learn that "appellees have borne the expense of this litigation by themselves (AGB,9), he is at a loss as to how this relates to the issues of the case. Apparently, the Attorney General would have this Court be influenced into ruling the statute which he defends to be constitutional as applied because the natural father does not have as much money as the stepfather. The children might just as well be on the auction block and sold to the richest bidder. The Attorney General's reference to this difference of wealth between the contending parties is odious.

* * * * * * * * * * *

Attorney General's Version:

"In the instant case, appellant never obtained nor attempted to obtain legal custody of the children." (AGB,13)

The Record:

Appellant was litigating legal custody with Maria in Family Court before the adoption proceedings were commenced in Surrogate's Court. (A.29) During that period, appellant himself had actual custody of his children.

* * * * * * * * * * *

Attorney General's Version:

"Although he did have actual custody for various periods of time * * *" (AGB,13)

The Record:

"Various periods of time" translates into more than half

the life of each child as of the date of the adoption orders.

* * * * * * * * * * *

Attorney General's Version:

The nature of the case is that it is a "custody proceeding" (AGB,13)

The Record:

It is not that. It is a contested "adoption" case. The difference is profound. Adoption involves an attempt to terminate a natural parent's rights by substituting a blood stranger in his place. (*Corey L.*) The only "custody proceeding" in the Record is the one that pended in the Family Court while this adoption proceeding worked its way through the Surrogate's Court, and which finally died on the vine. (A.29)

* * * * * * * * * * *

Attorney General's Version:

"The court did not attempt to break up an existing family unit. The court placed the children in a home they were already living in." (AGB,13)

The Record:

The court attempted to break up a life-long family unit of children with their father. When ordered adopted, the children belonged to two family units: their father's unit, including their stepmother Nina; their mother's unit, including their stepfather Kazim. During the two months before the filing of the adoption petition, they were a constituent part of their father's family unit. During the preceding fourteen months, they were in Puerto Rico, a physical part of neither unit, having been sent there by their mother and stepfather. During the six to nine months before that, they lived with their mother and stepfather, but spent

weekends with their father. Prior to that, from birth until their mother removed herself and them from the family home, the children lived in a family home with both mother and father, raised and cared for by both. Later, during the eight months in which the adoption proceedings pended in the Surrogate's Court, the children were temporarily with the mother, their father seeing them weekly pending a Family Court hearing and custody determination, which never took place. The adoption orders severed the children's existing family relationship with their father and broke up that family unit. An existing family unit with their stepfather Kazim had hardly begun, despite his two and one-half year marriage to their mother.

* * * * * * * * * * *

Attorney General's Version:

The lower courts "could find no credible evidence that the children were anything but healthy and happy in the existing (sic) family unit." (AGB,13)

The Record:

There was also no evidence "that the children were anything but healthy and happy in the existing family unit" with their father, nor was any finding contrary to this ever made by the lower courts. (See Appellant's Brief, pp. 10-15, with "R" and "A" references)

* * * * * * * * * * *

Attorney General's Version:

"The Surrogate, as evidenced by his decision, also based much of his decision on the credibility of appellant's witnesses. These witnesses were personally before the Surrogate and their credibility was judged by one of New York's most experienced trial jurists." (AGB,13)

The Record:

The witnesses were not "personally before the Surrogate." Not a single witness was seen or observed by one of New York's most experienced trial jurists. He was not even present at the trial. This was "heard before Renee Roth, Esq., a Law Assistant to the Surrogate of Kings County". (A.31,34, R.71, 235, 259)

* * * * * * * * * * *

Appellees' and Attorney General's Version:

"Factually, the only distinction between *Quillon* and this case, was that Quilloin had not lived with the natural mother for any period of time." (AEB, 38-9) "In fact, appellant's contributions to the relationship were not much more that Mr. Quilloin's * * *. We are confronted with a fact situation as devoid of paternal interest and care as in *Quilloin.*" (AGB,15)

The Record:

Another distinction is that appellant lived with his children for many years and shouldered the burdens of parenthood in their care. "In fact" we are confronted with the breaking up of a family where there was a "paternal interest and care" much like that which one might find in the case of a devoted and concerned married father, and to which the *Quilloin* facts do not even bear comparison.

* * * * * * * * * * *

Appellees' Version:

"However the appellant's briefs distort the character, fitness and concern of this unmarried father, the Surrogate in approving the adoption, justifiably found him unfit, unconcerned and unsupportive." (AEB,27)

The Record:

No court ever found appellant to be "unfit, unconcerned

and unsupportive", or made any other derogatory findings concerning him as a person or as a father. (See Opinion of Surrogate, A.27-30; Memorandum Opinion of Appellate Division, A.41-2; Memorandum Opinion of Court of Appeals, A.45) If any court had done so, it would be expected that appellees would have pointed out where. Since no court had done so, appellees merely inserted this blatantly erroneous statement in their brief and left it undocumented. Even appellees concede his fitness.

* * * * * * * * * * * *

C. Appellees' and Attorney General's Erroneous Recital of Statutes Which Were Enacted After the Adoption Orders.

Appellees and the Attorney General each go so far as to cite versions of statutes and whole sections of law, which had not even been enacted at the time of the adoptions, as the relevant statutes involved. The adoption orders came down September 10, 1976. (A.31, 34, 37, 39) Appellees set forth Section 111, as it had been amended, effective January 1, 1977. (AEB,4-8) The Attorney General sets forth the complete text of N.Y. Dom.Rel.L., §111-a, which also did not become effective until January 1, 1977. (AGB,2-5) Obviously neither played any role in this case which had already been decided. Both appellees and the Attorney General agree that the statute which governed, N.Y. Dom.Rel.L., §111, as it stood at the time of the adoptions, is correctly reproduced at pp. 5-6 of Appellant's Brief. (AEB,8; AGB,2)

In addition, the Attorney General cites an amended version of New York Fam. Ct. Act, §522. This he agrees was not only "made effective after the initiation of the

instant proceeding". It was also not in effect when the adoption orders were rendered on September 10, 1976. The effective date of the amendment was January 1, 1977. The Attorney General concedes that it would not have changed the result if it had been in force earlier. (AGB,10) But he nonetheless proceeded to make the misleading claim "that it permits a putative father to petition the courts of New York State to legitimate his child at any time during the lifetime of the putative father." Amicus, ACLU, also drew the same erroneous conclusion, apparently based on confusion regarding its effective date. (ACLU Brief,2) This all misleads by making it appear that appellant had the option to legitimate the children if he had chosen to exercise it. He did not have the option.

Before McKinney's Session Laws of 1976, Chapter 665, §6, eff. 1/1/77, amended §522, only the mother of a child born out of wedlock could initiate a filiation proceeding. By the amendment, the father of such a child was enabled to do so for the first time. A father who attempted to petition for an order of filiation before January 1, 1977, to legitimate his children lacked standing and the proceedings would be dismissed. *Matter of Alvin B. v. Denise C.*, 85 Misc.2d 413 (1976) But by that date appellant's children had already been "adopted" by Kazim Mohammed.

In fact, appellant attempted to legitimate the children by use of the only available remedy. This was his cross-petition to adopt. The effort was vetoed by the female appellee. No other legal avenue was open to him.

But not even a filiation order at the instance of the mother could have saved appellant's parentage under §111. It had been stipulated in *Malpica-Orsini* (36 N.Y.2d 568, 569) that the father there had been adjudicated to be the father. This did not make his consent to the adoption necessary

under the statute. Said the Court of Appeals in that case: (536 N.Y.2d, 576)

> "To allow it for fathers adjudicated to be such in compulsory proceedings would not alleviate the situation measurably since they are likely to be resentful and their enforced nexus with the child bears no relationship to their entitlement."

V.

THE COURT OF APPEALS DISMEMBERS STANLEY v. ILLINOIS IN NEW YORK.

A. The Selective Denial of Substantive *Stanley* Rights in New York to Unwed Fathers.

So far has New York strayed from adhering to the decisions of this Court in the area that *Stanley v. Illinois* is accepted as the law of the land on substantive due process in the case of all parents except, ironically, unwed fathers. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546 (1976), adjudicating a natural mother's parental rights, paid tribute to *Stanley* as the font of the applicable constitutional principles relating to parental rights. *Matter of Goldman*, 41 N.Y.2d 894 (1977) and *Corey L.* (1978) in turn applied *Bennett v. Jeffreys* "*Stanley*" doctrine to a mother and a married father respectively. *Malpica-Orsini* sweepingly denies it to unwed fathers.

B. The *Stanley* Principles are Accepted Throughout the Country as Governing the Rights of Parents, Including Unwed Fathers, in Adoption Cases, but in New York only of Wed Fathers.

Appellant urged the courts below to apply the *Bennett v. Jeffreys* "*Stanley*" doctrine to himself as an unwed father. Appellees opposed its application. The courts below agreed with appellees and refused to do so. Six months later, in *Corey L.*, the Court of Appeals found that the doctrine indeed did apply to a married father. Appellees, in an abrupt about face, now quote from the *Bennett v. Jeffreys* recital of *Stanley* principles extensively in their brief to this Court.

If their purpose in reciting *Bennett v. Jeffreys* was to show that the first "unfitness" and the second "best interest" stages have merged in New York, they were just done in by *Corey L.* In the July 1978 *Corey L.* decision, the Court of Appeals held that the two stages remain separate, distinct, and inviolably so, as a matter of constitutional and statutory law for married fathers.

At the time of *Stanley v. Illinois*, (1972), only five states in the Union gave fathers of children born out of wedlock the right to safeguard their relationship with their children in adoption cases.[3] *Stanley* was not an adoption case but, twenty-eight additional states, plus the District of Columbia, understood its relevance to the consent provisions of their adoption laws. Twenty-eight jurisdictions amended their relevant statutes[4] and a court decision voided the

[3]Ala. Code 17: §3; Idaho Code 16-1510; Nev. Rev. Stat. §127.040; R.I. Gen. Laws Ann. §15-7-5; S. Dak. Codified Laws 25-6-1.

[4]Ariz. Rev. Stats. §8-106; Civ. Code of Calif. §224; Colo. Rev. Stat. 1973 §19-4-107; Conn. Gen. Stat. §45-61; Del. Code. 13 §1106(2); Dist. of Col. Code. §16-304; Fla. Stat. Ann. §63.062; Hawaii Rev. Stat. §578-2; Iowa Code 600.7; Ill. Stat. Ann. 4 §9.1-8;

(continued)

contrary old statutes in Pennsylvania[5] so as to safeguard the parental rights of unwed fathers. A total of thirty-four jurisdictions are now in compliance with *Stanley*. New York is among the minority of hold-out states. *Malpica-Orsini* furnished its rationale.

C. The *Malpica-Orsini* Assault on *Stanley*.

The constitutionality of the New York statute denying non-consent rights to all unwed fathers was sustained below on the basis of *Malpica-Orsini*. That case is heavily relied on by appellees and the Attorney General. The New York Court of Appeals looked darkly upon *Stanley v. Illinois*. (36 N.Y.2d, 575)

> "Following the decision in *Stanley v. Illinois* (405 U.S. 645), Ursula Gallagher, an adoption specialist in the Department of Health, Education and Welfare, in expressing apprehension, observed: 'The new legalities would mean that many of these children [available for adoption] will spend their early lives in foster homes'; and Dr. Ner Littner, psychiatric consultant to agencies in Chicago, said: "We know today that keeping a baby in a boarding house can cripple him emotionally'

(footnote continued from preceding page)

Burns Ind. Stat. 31-3-1-6; Ken. Rev. Stat. 199-500; Mich. Comp. L. Ann. 710.43; Minn. Stat. Ann. §§259.24, 257.26; §1 House Bill 972, 2d Reg. Sess, 79th Genl. Assembly, Mo., (eff. 8/13/78); Rev. Stat. Neb. §43-104; N.M. Stat. Ann. 22-2-25; Gen. Stat. N.C. §48-6; N.H. Rev. Stat. Ann. 170-B:5(d); Page's Ohio Rev. C. §3107.01(B); Ore. Rev. Stat. 109.098; Code of Laws of S.C. 1976 §15-45-70; Vernon's Texas Codes Ann., Fam. Code, §16.03; Code of Virginia 1950 §63.1-225(2); Rev. Code of Wash. Ann. 26.32.030; W.Va. Code §48-4-1; Wisc. Stat. Ann. 48-84(3); Sess. L. of Wyoming, 1977 Ch. 187 1-726.9.

[5]*Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976)

> (Fathers' Rights—Supreme Court Rulings on Adoption Complicate the Placing of Children, Wall Street Journal, July 9, 1972, p. 1, col. 1)."

The New York court reasoned that "adoption is a means of establishing a real home for a child." It emphasized its role in "promoting the welfare of an otherwise homeless child." It stated that "never before have there been so many thousands of children for whom society finds each year that it must make some provisions." With dread, it warned of the disasters which it claimed would result from requiring "the consent of fathers of children born out-of-wedlock * * *, or even some of them." These included: "denying homes to the homeless"; "depriving innocent children of the other blessings of adoption"; continuing "the cruel and undeserved out-of-wedlock stigma"; severely impeding "the worthy process of adoption"; difficulties "in locating the putative father"; lack of birth certificate identification of the father; post-adoption harassment of adopting couples; dissuasion of couples considering adoption; and "oppressive burden on charitable agencies"; the "unlikelihood" of obtaining the natural father's consent to an "early private placement"; granting "to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion"; discouragement of marriages because prospective husbands denied the prospect of adopting their offspring would shrink from nuptials with mothers. (All cited in Attorney General's brief, 16-19)

None of these problems apply or exist at bar. The children were not homeless. They do not need the "blessings of adoption". No "cruel and undeserved out-of-wedlock stigma" would attach if appellee Maria had not vetoed appellant's cross-petition to adopt. The difficulty here was not in locating the father but in dislocating him.

No charitable agencies were involved. The public purse was not threatened. "A fertile field for extortion" of a devoted father by a vindictive mother who could simply use her power to deprive the father of his children as a weapon was created by the holding below. No marriage was discouraged by lack of adoption possibilities. (And if this issue be credited with even a modicum of weight, it could as well be applied to Nina's marriage to Abdiel, as to Maria's to Kazim.)

Especially after *Quilloin*, the *Stanley* rights of parents are reserved for only those unwed fathers who have shared a family relationship with their children and borne responsibility for their daily care. The putative fears of *Malpica-Orsini* were dispelled, if they ever had any foundation.

Nonetheless, appellees depend on a pronouncement by this Court that even the strongest ties between unwed fathers and their children, are helplessly vulnerable to rupture at the whim of mothers and their newly-acquired husbands. Not only would this require a complete overruling of *Stanley* and *Quilloin*, and of the traditional principles which those cases expressed, but such a holding would be self-defeating. It would tend to discourage fathers from exposing themselves and their children to that threat. Men and women would, of course, not be dissuaded from out-of-wedlock sex. But when children result, their fathers would be told by this Court not to love and care for them except at their peril. Fathers would be encouraged to keep away from their children, lest they build a family relationship on legal quicksand. Instead of support fostered and voluntarily given based on bonds of parental affection, it would be left to compulsion afforded by filiation proceedings and by the support of dependents' laws. The

effect would be to deprive children of fathers and add to the number of homeless, fatherless children, with adoption or foster care as the only "solution". The argument that such a decision would so favor "the best interest of the child" and lighten the burden on the public purse and child welfare and adoption agencies, as to warrant taking Caban's children away from him, is fatuous.

A careful appraisal of Stanley's impact authoritatively appears in The Journal of School Health. (*The Unmarried Father Revisited*, Reuben Pannor, Director of Case Work and Research, Vista Del Mar Child Care Services, Los Angeles and Byron W. Evans, Senior Statistician, American National Red Cross, Washington).[6] Summarizing their review, the authors state: (at p. 290)

> "In conclusion, legal implications of STANLEY vs. ILLINOIS may in the long run prove advantageous to single parents and their children. The single father has long been overlooked by many social agencies. But this is no longer possible, and the involvement of the father that now becomes necessary by law can result in better social work services. Helping single fathers act in responsible ways must be viewed as a positive step that can have positive effects upon the father, the mother, and the future of the child. The child's welfare should be the overriding consideration as alternative plans are being considered. Nevertheless, the rights of the father who desires and claims competence to care for his child should be protected, the interests of all three parties need to be taken into account. Only when this is done can we hope for viable solutions to problems that have deep roots and affect many lives for years to come."

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[6]The Journal of School Health, XLV No. 5: 286 (May 1975).

D. The Dismemberment of *Stanley*.

But for fear of the speculative horrors which *Malpica-Orsini* postulates, the New York court sought to avoid following *Stanley*. It defiantly refused to grant unwed fathers their substantive rights. *Stanley's* mandate that such parents, like all others, "are constitutionally entitled to a hearing on their fitness" before losing their children to strangers (405 U.S., 658) was, *mirable dictu*, transformed by the Court of Appeals into what could be read as "constitutionally entitled to a hearing on the best interest of their children." In the present case, in the wake of *Malpica-Orsini* — this Court's interpretation of the Fourteenth Amendment in *Stanley* having passed into discard in New York because of it — the father's right to a hearing on his own fitness has been transmuted by judicial alchemy and shrunk into the right to offer evidence "concerning the solidity of the marriage and the concern and treatment of the child [sic] in the new family." (Surrogate Sobel's Opinion, A.28)

This is no "right" worthy of the name. The unwed father might as well be given a free ticket to ringside. "The private interest here, that of a man in the children he has sired and raised * * * the interest of a parent in the companionship, care, custody and management of his children * * *, the right to * * * raise one's children [which] have been deemed 'essential' * * * 'basic civil rights of man' * * * 'rights far more precious * * * than property rights' " (*Stanley v. Illinois*, 405 U.S., 651) is debased to mean a "right" to be present at the ceremony at which the father is to lose his children, and to say a few words on the merits of a man he knows nothing about before the final gavel is struck and he is replaced as parent by a total stranger. For if

adoption is always so necessary in the best interest of children born out-of-wedlock, who are far from homeless, that the right of a fit and devoted father to keep them must be written off, the only question remaining is the fitness of the adoptive parent. That is exactly what the courts below held to be the issue. This Court's interpretation of rights under the United States Constitution in *Stanley* was airily ignored as overruled on the authority of the State high court's decision in *Malpica-Orsini*.

It is fundamental that the primary right and responsibility to raise and care for children belongs to their parents. Where a parent is fit, has exercised that role, and desires to continue doing so, this is the end of the matter. It makes no difference whether the parent is male or female, married or not. "The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit father." (405 U.S., 657)

Hence, establishment of unfitness is a constitutionally mandated threshold in any proceeding leading to termination of parental rights. This rule of *Stanley* has been rejected by the Court of Appeals specifically in cases involving unwed fathers — the very class of parents specifically involved in *Stanley*. The New York court, in *Malpica-Orsini* and here, bisected the *Stanley* rule into its procedural and substantive Due Process elements and dismembered it The procedural aspect — notice and hearing, was preserved. But the substantive threshold purpose of the hearing — to determine fitness — was thrown out. It was not to be restored by the Court of Appeals until that court considered an effort to dispense with the consent of a duly married father to the adoption of his children by a stepfather. *Matter of Corey L., supra.* And there, the *Stanley* principles and the §111 statutory

safeguards for married, as distinct from unmarried, fathers were all resuscitated and recognized — at least as jurisdictional thresholds for the protection of married fathers' rights.

Malpica-Orsini, in turn, appears miraculously to have been saved from reversal because its shallow record failed to raise a substantial constitutional question. (*Orsini v. Blasi*, 423 U.S. 1042). An evidentiary hearing had been waived in that case. The only facts before the Court, despite appellees' contentions to the contrary, (AEB,33-4), were those stipulated by the parties.[7] The facts did not include that the father had ever played any meaningful parental role toward his child. It was not agreed in that case that he had raised his offspring or had a family relationship with her, such as was entitled to constitutional protection under *Stanley*. The record here, in contrast, establishes those facts.

Dismissal of the appeal in *Orsini v. Blasi* should be without persuasive force. At bar, on different facts, the Court did not dismiss, but noted probable jurisdiction. It will review the constitutionality of the statute as applied to a father with a sturdy ongoing family relationship with his children for the first time.

[7]A copy of the stipulation of facts in *Malpica-Orsini* is appended to Appellant's Brief in opposition to appellees' motion to dismiss the appeal or to affirm.

CONCLUSION

The judgments on appeal should be reversed.

Respectfully submitted,

ROBERT H. SILK
Attorneys for Appellants